United States of America National Labor Relations Board

CCLA 9 LLC d/b/a/ Riverview Health North

Employer,

Case No.

07-RC-089352

and

SEIU Healthcare Michigan,

Union.

EMPLOYER'S REQUEST FOR REVIEW
OF THE
DECISION AND DIRECTION OF ELECTION

Pursuant to the provisions of Section 102.67 of the Board's Rules and Regulations, the Employer, CCLA 9 LLC, d/b/a/ Riverview Health and Rehabilitation Center North, by and through its attorneys, Clark Hill, files the following Request for Review of the Regional Director's October 18, 2012 Decision and Direction of Election in the above-captioned matter. This request is based on the following compelling grounds for review: (1) A substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent; (2) the Region's decision on several substantial factual issues is clearly erroneous on the record and such error prejudicially affects the rights of a party; and (3) there are compelling reasons for reconsideration of the Board's rule or policies set forth in *Specialty Healthcare*, 357 NLRB No. 83 (2011). For the reasons that follow, the Employer hereby requests that the Decision of the Regional Director be set aside and that the Board issue an Order confirming the following appropriate unit:

All full-time and regular part-time certified nursing assistants (CNAs), restorative CNAs, activity assistants, unit secretaries, cooks, food service assistants, housekeepers, laundry aides, floor technicians, and resident transport drivers employed by the Employer at its facility located at 18300 E. Warren Avenue, Detroit, Michigan; but excluding Licensed Practical Nurses (LPNs), Registered Nurses (RNs), business office, clerical employees, social workers, resident representatives, spiritual care assistants, tech nutrition service employees, admission director, social service director, admissions assistant, accounts payable, central supply, registered dietician, medical records, and guards and supervisors as defined by the Act.

I. BACKGROUND

The Employer, CCLA9 LLC d/b/a Riverview Health and Rehabilitation Center North is a for profit long term care facility located at 18300 East Warren, in Detroit Michigan. T-7. The Employer purchased the facility on January 11, 2011. T-8. During the calendar year ending December 31, 2011, the Employer had gross revenues in excess of \$100,000 and received revenues in excess of \$50,000 from the United States Government through Medicare and Medicaid program payments. T-7-8.

The Employer's Facility is a three story building with two units on the first floor, and individual larger units on the second and third floors. T-21. Each unit is staffed by a combination of assigned nurses. *Id.* The Facility currently has 160 beds on-line and is getting ready to add another 20 beds on October 20, 2012. T-26. That said, although the Facility is organized by departments (See E-2), the various departments "all work together" and "interact daily together to make [the] building work as well as it does." T-23. Indeed, the undisputed evidence presented established that the separate departments only exist separately for "Medicaid and Medicare billing purposes and reimbursement purposes." T-26.

Based upon this structure, the Employer's charge nurses ultimately supervise any of the individuals providing services to the residents on their units. T-22-26 & 58. This includes not only the Employer's CNA's, but laundry employees, floor technicians, housekeeping employees,

dietary employees, unit secretaries, and transport employees as well. *Id.* As such, while individuals in the various departments may initially report to an separate individual department head, they are required to follow the instructions of the Employer's charge nurses when it comes to services provided to the residents on the units.

Moreover, individuals in the various departments regularly help one another in the delivery of services to the Employer's residents. In doing so, it is not uncommon for an CNA to provide food to a resident, clean or pass trays in the furtherance of resident care. See for example, T-103-104, 106-07 & 114. Indeed, the Facility Administrator confirmed that the Facility operates under such an all hands on deck approach, when she noted:

... with the departments and the way the facility is run, it's like one big team. I mean, we will cross over and do whatever we need to do in any department to take care of the residents. At the end of the day, everyone has interacted so closely together, it's like a family. I would hope that a CNA would not have to do laundry, but if you need to take care of that resident ...

T-60-61. As such, there should be little doubt regarding the integrated nature of the Employer's operations and the various classifications that work therein because everyone is there to take care of the residents. T-108-09.

In this regard, it should come as no surprise that these overlaps in employees' terms and conditions of employment go beyond the tasks employees are assigned to the other terms and conditions of employment as well. For instance, all employees fill out the same application (T-44 & 83-84) and go through the same orientation (T-62-65, 72 & 98), regardless of the department that they will ultimately work in. Indeed, as a general rule the employees in the Facility all work under almost identical terms and conditions of employment. For example, they all work under the same policies and employee handbook (T-66, E-3), have the same benefit package (T-67-70. See also, E-4 & E-5), have the same break room (T-80-81), use the same parking lot (T-81),

attend the same appreciation lunches (T-81-82) and are paid on an hourly basis (T-87 & E-6). Likewise, other than transport drivers, activity assistants (who wear polo shirts) and the floor technician (who wears a dark blue shirt and pants), the vast majority of the Employer's employees are required to wear scrubs to work. T-40-41. As such, it makes sense that the individuals in the Employer's typical service classifications have been traditionally treated as an individual group.

Indeed, shortly after the Employer purchased the Facility, SEIU, Healthcare Michigan ("Petitioner" or "Union") petitioned to represent a *traditional* service unit¹ of the Employer's employees. *See Case No. 7-RC-23364*. Following the filing of that petition, the Employer and Petitioner entered into a stipulated election agreement that was approved by the Region 7 Regional Director on February 17, 2011. E-1. That agreement included a mutual agreement that the following group was the appropriate collective-bargaining unit:

All full-time and regular part-time certified nursing assistants (CNAs), restorative CNAs, activity assistants, unit secretaries, cooks, food service assistants, housekeepers, laundry aides, floor technicians, and resident transport drivers employed by the Employer at its facility located at 18300 E. Warren Avenue, Detroit, Michigan; but excluding all registered nurses (RNs), licensed practical nurses (LPNs), business office clerical employees, professional employees, social workers, resident representatives, spiritual care assistants, technical employees, tech-nutrition services employees, managers, and guards and supervisors as defined in the Act.

Id. at 2. The Union, however, withdrew that petition on March 8, 2011, which was prior to any actual election. T-19-20.

On or about September 7, 2012, the Union filed another petition. See 07-RC-088730. However, this time the Union sought to represent all of the Employer's "full and regular part

i.e. a unit under the analysis presented by the Board in *Park Manor Care Ctr*, 305 NLRB 872 (1991). That said, it should be noted that the Employer does not employ maintenance employees, which would complete a historical service and maintenance unit. Rather, maintenance at the Employer's facility is supplied by the property manager.

time CENA'S employed by the employer located at 18300 E. Warren" and exclude "all Managers, LPN's, RN's, BOC, Housekeeping, Dietary, Laundry, Floor care, Maintenance and Guards as defined by the Act." *Id.* That petition, however, was withdrawn by the Union on or about September 17, 2012. *Id.* Thereafter, the instant petition, which seeks to represent the same unit, was filed on or about September 17, 2012. *See 07-RC-089352*.

A hearing on this matter was held at the National Labor Relations Board Offices in Detroit Michigan on or about September 24, 2012. After both parties submitted briefs, the Region issued the instant Decision and Direction of Election on October 18, 2012. This Request for Review follows

II. LEGAL ANALYSIS

A. Burden of Proof

At the hearing on this matter, the Employer objected to the application of the Board's decision in *Specialty Healthcare*, 357 NLRB No. 83 (2011) to the current petition. Specifically, the Employer asserts that the Board's decision in *Specialty Healthcare* was an abuse of discretion that improperly deferred to the petitioned for unit and ignored its obligation to effectuate the Act's policy of efficient collective bargaining.² Indeed, in the case at hand (unlike in *Specialty Healthcare*) the petitioning union seeks to represent a unit that represents only a portion of the individuals unit it sought to represent in the last calendar year (*See* Case No. 7-RC-23364). Given this blatant attempt to stack the deck following a previously failed organizing effort, the Region should have subjected the current petition to a higher level of scrutiny than set forth in *Specialty Healthcare*. Rather, in the case at hand, the burden should undisputedly be on the

Moreover, the Board's decision in *Specialty Healthcare* improperly promulgated a rule for determining an appropriate bargaining units not covered by the Board's health care rule, in violation of the requirements of the Administrative Procedures Act.

Union to demonstrate why the currently petitioned for CNA unit is more appropriate than the general service unit the Union sought to represent during the last calendar year.

In this regard, the Board must be mindful of the fact that "the Board's discretion in unit determinations in not without constraints" and will be reversed by the Courts where the Board oversteps the law. *NLRB v Catherine McAuley Health Ctr.*, 885 F2d 341, 244 (6th Cir. 1989)(quoting *Allied Chemical & Alkali Workers v Pittsburgh Plate Glass Co.*, 404 US 157 (1971)). In the current instance, the Board's discretion is expressly governed by the requirements of Section 9(c)(5) of the Act, which provides that "[i]n determining whether a unit is appropriate for the purposes specified in subsection (b) of this section the extent to which the employees have organized shall not be controlling." 29 USC § 159(c)(5). (Subsection (b) provides that the Board must "assure employees the fullest freedom in exercising the rights guaranteed by the National Labor Relations Act." 29 USC § 159(b)). Likewise, "[i]n addition to explicit statutory limitations, a bargaining unit determination must effectuate the Act's policy of efficient collective bargaining." *Catherine McAuley Health Ctr., supra.*

In the case at hand, the difference in the unit sought compared to the unit involved in the Union's prior organizing effort cannot be overlooked. At a minimum, the distinction should have required the Region to place the initial burden on the Union to explain why the previously agreed upon unit should not be binding. To do otherwise, essentially allows any union to simply withdraw a failing organizing effort and propose the unit it that it actually was able to organize. Needless to say, this is precisely the result the Courts have repeatedly warned against. *See NLRB v Magnetic Specialty, Inc.*, No 96-6115, 1997 WL 650821 at *4 (6th Cir., Oct. 17, 1997), *NLRB v Lundy Packing Co.*, 68 F3d 1577, 1581 (4th Cir. 1995) and *Laidlaw Waste Sys., Inc. v NLRB*, 934

F2d 898, 900 (7th Cir, 1991). As such, the Board should take this opportunity to remedy the Region's error in this regard.

Indeed, placing the burden of proof on the Employer in this instance goes directly against the tenants of section 9(c)(5) of the Act. In this regard, the Courts have repeatedly confirmed that the Board in prohibited from requiring an employer to provide "overwhelming" evidence to rebut the presumption that a petitioned for unit is appropriate and the "overwhelming" community of interest rule adopted in *Specialty Healthcare*, *supra*, is the same "novel legal standard" soundly rejected by the Court in *Lundy*, *supra*. That is, by placing the burden on the employer, the *Specialty Healthcare* rule presumes that the union's proposed unit is appropriate unless the employer can show that "excluded employees share an 'overwhelming community of interest' with the petitioned for employees," *Specialty Healthcare*, *supra* at 14, the Board improperly alleviated the Union of its burden of demonstrating that the petitioned for unit was appropriate to begin with. However, is precisely that burden shifting that the Court in *Lundy* prohibited. *See Magnetic Specialty*, 1997 WL 650821 at *4. As such, the Region violate Section 9(c)(5) of the Act by placing the burden on the Employer in this instance (i.e. to prove that the petitioned for unit is not appropriate). Needless to say, the Board must now correct this error.

Allowing this error to stand will only encourage unions to "gerrymander" bargaining units "to their hearts' content", leaving many employees "left out of the collective bargaining process." *Cont'l Web Press, Inc v NLRB*, 742 F2d 1087, 1090, 1093 (7th Cir. 1984). Indeed, given the circumstances surrounding the present petition, the current record would appear to be a classic example of gerrymandering. Needless to say, the only way to prevent this result is to require the that the burden be placed upon the Union to demonstrate why the currently petitioned for unit is more appropriate than that historically applied by the parties involved. As such, the

burden in this instance should be on the Union to establish why a different unit than that previously sought should be allowed in this instance.

B. The Petitioned For Unit is Not An Appropriate Unit

Needless to say, in effectuating the Act's policy of efficient collective bargaining, the Board is required to group together "employees who have substantial mutual interests in wages, hours, and other conditions of employment." *Allied Chemical*, 404 US at 172. "Such mutuality of interest serves to assure the coherence among employees necessary for efficient collective bargaining and at the same time to prevent a functionally distinct minority group of employees minority group of employees from being submerged in an overly large unit." *Id.* at 172-73. As such, each unit determination, in order to further effective expression of the statutory purpose, much have a direct relevancy to the circumstances within which collective bargaining is to take place." *NLRB v. Pinkerton's, Inc.*, 428 F2d 479, 482 (6th Cir. 1970). After all, "if the unit determination fails to relate to the factual situation with which the parties must deal, efficient and stable collective bargaining is undermined rather than fostered." *Id.*

While a petitioner's desired unit is always a relevant consideration, that issue is not dispositive with regard to what is an appropriate unit. *Marks Oxygen Co.*, 147 NLRB 228, 230 (1964); and *Airco, Inc.*, 273 NLRB 348 (1984). For instance, a proposed bargaining unit based on an arbitrary, heterogeneous, or artificial grouping of employees is not appropriate. *See Moore Business Forms, Inc.*, 204 NLRB 552 (1973); and *Glosser Bros., Inc.*, 93 NLRB 1343 (1951). Rather, "the manner in which a particular employer has organized his plant and utilizes the skills of his labor force has a direct bearing on the community of interest among various groups of employees in the plant and is thus an important consideration in any unit determination." *International Paper Co.*, 96 NLRB 295, 298 fn. 7 (1951). Thus, when all employees have similar

working conditions, are under common supervision, and interchange jobs frequently, a unit including only part of them is not appropriate. *U.S. Steel Corp.*, 192 NLRB 58 (1971).

"In determining whether the employees possess a separate community of interest, the Board examines such factors as mutuality of interest in wages, hours, and other working conditions; commonality of supervision; degree of skill and common functions; frequency of contact and interchange with other employees; and functional integration." *Bartlett Collins Co.*, 334 NLRB 484, 484 (2001). However, in applying these principles, there should be little doubt that (primarily due to the functional integration of the Employer's operations) the appropriate unit in this instance embodies the total group of the Employer's service employees, rather than the small portion of that group proposed by the Union. In this regard, there can be little doubt that the Employer has historically treated this group as a single entity for labor relations purposes and, in fact, so has the Union. (See Case No. 7-RC-23364).

Indeed, the undisputed evidence at the hearing demonstrated that the Employer's operations are treated as three basic labor groups (i.e. upper management, professional employees (including RN's and LPN's) and the general service group involved in the prior petition). In this regard, these groups are separated by pay, education and skill levels. This is not surprising since these "groups" are generally excluded from inclusion in the same bargaining unit. Indeed, of the three groups the Board would historically only allow the creation of a general service and/or maintenance unit.

However, with regard to the proposed unit, there should be little doubt that the CNA's cannot be separated from the other service positions without undermining the possibility of effective collective bargaining. Indeed, there was ample evidence presented demonstrating that how the employer's various service classifications are fully integrated in the provision of

services to the residents residing at the Employer's Facility. In this regard, under the Employer's operations, employees "all work together' and "interact daily together to make [the] building work as well as it does" T-23. Moreover, individuals may transfer to any other position in the Employer's operations for which they are qualified. T-53 & 88-91. *See also* E-3, p. 13.

Based upon this structure, the Employer's charge nurses ultimately supervise any of the individuals providing services to the residents on their units. T-22-26 & 58. This includes not only the Employer's CNA's, but laundry employees, floor technicians, housekeeping employees, dietary employees, unit secretaries, and transport employees as well. *Id.* As such, while individuals in the various departments may initially report to a separate individual department head, they all eventually report to and work under the Employer's charge nurses when it comes to services provided to the residents on the units. In this regard, individuals in the various departments regularly help one another in the delivery of services to the Employer's residents. In doing so, it is not uncommon for a CNA to perform work regularly done by the dietary or housekeeping staff (i.e. provide food to a resident, take out the trash, clean-up after a resident, or pass trays in the furtherance of resident care). See for example, T-103-104, 106-07 & 114. See also, T-60-61. See also T-108-09.

In addition, the record confirms that the various classifications must work together to coordinate the services provided to residents. For example, CNA's and transport drivers must coordinate schedules to ensure residents are ready for appointments (T-122) and CNA's and housekeeping/floor staff must coordinate when cleaning occurs (T-42 and 58). As such, there is simply no way to separate the CNA's from the other service positions without impacting the mutual interests of the other groups. Their interests are simply not sufficiently distinct to justify

separation from the previously agreed upon general service unit and the Region's conclusions to the contrary are clearly erroneous on the record and prejudicial to the Employer.

For instance, since all of the employees are enrolled in the same insurance plans and retirement plan, an individual CNA unit could not negotiate changes in those benefits without potentially impacting the other individual groups. At the same time, any one of the individual groups involved could shut down the Employer's Facility should they decide to go on strike. As such, there should be little doubt that the Region should not have divided the Employer's service staff because doing so effectively undermined any possibility of efficient collective bargaining. Needless to say, this was a clear error that prejudiced the Employer and cannot now be allowed to stand.

Indeed, even in *Specialty Healthcare*, the Board recognized that there are circumstances when a "fractured" unit will not be appropriate notwithstanding a community of interest. *Specialty Healthcare*, *supra* at 13. In doing so, the Board stated as follows:

For example, employees inside and outside a proposed unit share an overwhelming community of interest when the proposed unit is a "fractured" unit. A petitioner cannot fracture a unit, seeking representation in "an arbitrary segment" of what would be an appropriate unit ... "[T]he Board does not approve fractured units, i.e., combinations of employees that are too narrow in scope or that have no rational basis.

Id. (quoting *Pratt & Whitney*, 327 NLRB 1213, 1217 (1999) and *Seaboard Marine*, 327 NLRB 556, 556 (1999)). As such, the Board should remedy the Region's error and overturn the Region's Decision determining that an arbitrary segment of the Employer's service staff was an appropriate unit.

C. <u>The Excluded Service Positions Share an Overwhelming Community of Interest With the CNA's</u>

Even assuming arguendo, that the petitioned for unit is appropriate under the community of interest test, the Employer rebutted the appropriateness of the unit by demonstrating that the additional employees it sought to include shared an "overwhelming community of interest" with the petitioned for employees. See Specialty Healthcare, supra at 14. To the extent, the Region made contrary findings, those conclusions are clearly erroneous on the record and prejudicial to the Employer. Specifically, the factors used to establish an "overwhelming" community of interest are the same factors as the traditional community of interest test and are established when the terms and conditions of employment for various employee groups "overlap almost completely." Specialty Healthcare, supra at 11. See also, United Rentals, 341 NLRB 540, 541 (2004) as quoted in Specialty Healthcare, supra, ("overwhelming and undisputed evidence of overlapping duties and interchange between the excluded employees and the petitioned-for employees, and their common terms and conditions of employment."). In this regard, it should not be lost that evidence of "identical" terms and conditions of employment are not required. Rather, an employer must only prove that they share a "close" or "strong" community of interest. *Id.* at 12.

Utilizing this analysis, there should be no doubt that the previously included service positions should be included in any appropriate unit. As already mentioned, these positions are fully integrated under the employers operations and operate under almost identical terms and conditions of employment. Moreover, the evidence in the current record goes beyond the distinctions present in *Specialty Healthcare*. For instance, in *Specialty Healthcare* there was no previously agreed upon appropriate unit from which historical labor relations groupings could be found, however, such evidence is undisputed in the current record. Likewise, in *Specialty*

Healthcare, at 9, the Board distinguished CNA's based upon their exposure to blood or other bodily fluids while the current record demonstrates that the majority of service staff are routinely exposed to blood and/or other bodily fluids. T-59-60 & 62.

Although the Board previously distinguished CNA's by their required certifications, the present record amply demonstrates that several of the Employer's service classifications require a certification of one type or another. However, even though some positions may require difference certifications (be it SafeServ, CNA, or a CDL), those certifications remain relatively low skilled positions involving just a few weeks of training followed by an examination and employees are not required to have passed those examinations at the time they are hired. T-82-83. This is especially true when compared to the skill levels and training required of the Employer's other staff (i.e. RN's and LPN's).

The Employer does not dispute that its nurses and CNA's are the only staff qualified to feed or position its residents. However, in the end, these are the only tasks that separates the aides from the other staff. Given the *significant* overlap in the other terms and conditions of employment CNA's have with the other service positions, this distinction alone is not sufficient to justify undermining the historical treatment of the service staff as a single group. This is especially true where, as here, CNA's regularly work with and perform tasks done by those other service positions and do so under the common supervision of the Employer's charge nurses.

Indeed, in the case at hand, the previously agreed upon service unit represents the total combination of the Employer's non-management/non-professional staff that directly provide services to the Employer's residents. While there may be slight variances in the terms and conditions of employment for these positions, there should be no disputing the overwhelming overlap in their terms and conditions of employment. As such, there should be no dispute of the

overwhelming community of interest shared by the positions contained in the previously agreed

upon appropriate unit and the Board cannot now allow the Region's unit determination to stand

in the face of the current record.

VII. <u>CONCLUSION</u>

In the case at hand, there is no justification for allowing a CNA only unit. Rather, given the

history of the parties and the integrated nature of the Employer's workforce, the only appropriate

unit in this instance would be the previously agreed upon appropriate unit involved in Case No. 7-

RC-23364. Indeed, even under the Board's analysis in Specialty Healthcare, the individuals in that

group share an overwhelming community of interest. As such, the Board should set aside the

Decision of the Region and confirm the following appropriate unit:

All full-time and regular part-time certified nursing assistants (CNAs), restorative CNAs, activity assistants, unit secretaries, cooks, food service assistants, housekeepers, laundry aides, floor technicians, and resident transport drivers employed by the Employer at its facility located at 18300 E. Warren Avenue, Datroit Michigan, but avaluding Licensed Practical Nurses (LPNs). Pagistared

Detroit, Michigan; but excluding Licensed Practical Nurses (LPNs), Registered Nurses (RNs), business office, clerical employees, social workers, resident representatives, spiritual care assistants, tech nutrition service employees, admission director, social service director, admissions assistant, accounts payable,

central supply, registered dietician, medical records, and guards and supervisors

as defined by the Act.

Any other unit would simply be inconsistent with the mandates of the Act.

Respectfully submitted,

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Dated: November 1, 2012

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that copes of the foregoing Request for Review have been filed electronically through the Board's E-Filing Program this 1st day of November, 2012.

Copies of said filing have been serviced upon the following persons by electronic mail:

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